

unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator.

115. Some commenters also asked whether certain requirements regarding construction or financial support of PEG facilities and I-Nets are unreasonable under Section 621(a)(1). Several parties indicate that, as a general matter, PEG contributions should be limited to what is "reasonable" to support "adequate" facilities.³⁸² We agree that PEG support required by an LFA in exchange for granting a new entrant a franchise should be both adequate and reasonable, as discussed above. In addressing each of these concerns below, we seek to strike the necessary balance between the two statutory terms.

116. Ad Hoc Telecom Manufacturers argue that it is unreasonable to require the payment of ongoing costs to operate PEG channels, because a requirement is unrelated to right-of-way management, the fundamental policy rationale for an LFA's franchising authority.³⁸³ In response, Cablevision asserts that exempting incumbent LECs from PEG support requirements would undermine the key localism features of franchise requirements, and could undermine the ability of incumbent cable operators to provide robust community access.³⁸⁴ We disagree with Ad Hoc Telecom Manufacturers that it is *per se* unreasonable for LFAs to require the payment of ongoing costs to support PEG. Such a ruling would be contrary to Section 621(a)(4)(B) and public policy. We note, however, that any ongoing LFA-required PEG support costs are subject to the franchise fee cap, as discussed above.

117. FTTH Council, Verizon, and AT&T ask us to affirm that PEG or I-Net requirements imposed on a new entrant that are wholly duplicative of existing requirements imposed on the incumbent cable operator are *per se* unreasonable.³⁸⁵ AT&T and Verizon argue that Section 621(a)(4)(B) requires adequate facilities, not duplicative facilities.³⁸⁶ FTTH Council contends that if LFAs can require duplicative facilities, they can burden new entrants with inefficient obligations without increasing the benefit to the public.³⁸⁷ FTTH Council thus suggests that LFAs be precluded from imposing completely duplicative requirements, and that we require new entrants to contribute *pro rata* share of the incumbent cable operator's PEG obligations. For example, if an incumbent cable operator funds a PEG studio, the new entrant should be required to contribute a *pro rata* share of the ongoing financial obligation for such studio, based on the new entrant's number of subscribers.³⁸⁸

118. In addition to advocating a *pro rata* contribution rule, FTTH Council requests that we require incumbents to permit new entrants to connect with the incumbent's pre-existing PEG channel feeds.³⁸⁹ FTTH Council proposes that the incumbent cable operator and new entrant decide how to accomplish this connection, with LFA involvement if necessary, and that the costs of the connection should be deducted from the new entrant's PEG-related financial obligations to the LFA.³⁹⁰ Others agree that PEG interconnection is necessary to maximize the value of local access channels when more than one

³⁸² BellSouth Comments at 8; Verizon Comments at 71

³⁸³ Ad Hoc Telecom Manufacturer Coalition Comments at 4.

³⁸⁴ Cablevision Reply at 29-30.

³⁸⁵ FTTH Council Comments at 66; Verizon Comments at 71; AT&T Comments at 67.

³⁸⁶ AT&T Comments at 67-68; Verizon Reply at 61

³⁸⁷ FTTH Council Comments at 67

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

video provider operates in a community.” New entrants seek a *pro rata* contribution rule based on practical constraints as well. AT&T asserts that, although incumbent cable operators can provide space for PEG in local headend buildings, LEC new entrants’ facilities are not designed to accommodate those needs. Thus, if duplicative facilities are demanded, new entrants would have to build or rent facilities solely for this purpose, which AT&T contends would be unreasonable under the statute.³⁹² NATOA counters that AT&T’s complaint regarding space mischaracterizes PEG studio requirements that exist in some franchises.”; Specifically, NATOA claims that LFAs generally are not concerned with a PEG studio’s location, and that PEG studios are usually located near cable headends simply because those locations reduce the cable operators’ costs.”

119. We agree with AT&T, FTTH Council, Verizon, and others that completely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable.³⁹⁵ Such duplication generally would be inefficient and would provide minimal additional benefits to the public, unless it was required to address an LFA’s particular concern regarding redundancy needed for, for example, public safety. We clarify that an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities. We note, however, that we would expect an LFA to consider whether a competitive franchisee can provide such additional functionality by providing financial support or actual equipment to supplement existing I-Net facilities, rather than by constructing new I-Net facilities. Finally, we find that it is unreasonable for an LFA to refuse to award a competitive franchise unless the applicant agrees to pay the face value of an I-Net that will not be constructed. Payment for I-Nets that ultimately are not constructed are unreasonable as they do not serve their intended purpose.

120. While we prefer that LFAs and new entrants negotiate reasonable PEG obligations, we find that under Section 621 it is unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator’s obligations. We also agree that *apro rata* cost sharing approach is one reasonable means of meeting the statutory requirement of the provision of adequate PEG facilities. To the extent that a new entrant agrees to share *pro rata* costs with the incumbent cable operator, such an arrangement is *per se* reasonable.³⁹⁶

³⁹¹ Communications Support Group, Inc. Reply at 17.

³⁹² AT&T Comments at 70.

³⁹³ NATOA Reply at 11-42.

³⁹⁴ NATOA Reply at 12.

³⁹⁵ If a new entrant, for technical, financial, or other reasons, is unable to interconnect with the incumbent cable operator’s facilities, it would not be unreasonable for an LFA to require the new entrant to assume the responsibility of providing comparable facilities, subject to the limitations discussed herein.

³⁹⁶ To determine a new entrant’s *per se* reasonable PEG support payment, the new entrant should determine the incumbent cable operator’s per subscriber payment at the time the competitive applicant applies for a franchise or submits its informational filing, and then calculate the proportionate fee based on its subscriber base. A new entrant may agree to provide PEG support over and above the incumbent cable operator’s existing obligations, but such support is at the entrant’s discretion. If the new entrant agrees to share the *pro rata* costs with the incumbent cable operator, the PEG programming provider, be it the incumbent cable operator, the LFA, or a third-party programmer, must allow the new entrant to interconnect with the existing PEG feeds. The costs of such interconnection should be borne by the new entrant. We note that we previously have required cost-sharing and interconnection for PEG channels and facilities in another context. Section 75.1505(d) of the Commission’s rules requires that if an LFA and OVS operator cannot reach an agreement on the OVS operator’s PEG obligations, the operator is required to match the incumbent cable operator’s PEG obligations and the incumbent cable operator is required to permit the OVS (continued...)

5. Regulation of Mixed-Use Networks

121. We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities. For example, we find it unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA's demands for regulatory control over non-cable services or facilities.³⁹⁷ Similarly, an LFA has no authority to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities. For example, assuming an entity (e.g., a LEC) already possesses authority to access the public rights-of-way, an LFA may not require the LEC to obtain a franchise solely for the purpose of upgrading its network.³⁹⁸ So long as there is a non-cable purpose associated with the network upgrade, the LEC is not required to obtain a franchise until and unless it proposes to offer cable services. For example, if a LEC deploys fiber optic cable that can be used for cable and non-cable services, this deployment alone does not trigger the obligation to obtain a cable franchise. The same is true for boxes housing infrastructure to be used for cable and non-cable services.

122. We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services. We agree with Verizon that the "entirety of a telecommunications/data network is not automatically converted to a 'cable system' once subscribers start receiving video programming."³⁹⁹ For instance, we find that the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services.⁴⁰⁰ Local regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of local franchising authority and is inconsistent with the definition of "cable system" in Section 602(7)(C).⁴⁰¹ This provision explicitly states that a common carrier facility subject to Title II is considered a cable system "to the extent such facility is used in the transmission of video programming . . ."⁴⁰² As discussed above, revenues from non-cable services are not included in the base for calculation of franchise fees.

123. In response to requests that we address LFA authority to regulate "interactive on-demand services,"⁴⁰³ we note that Section 602(7)(C) excludes from the definition of "cable system" a facility of a common carrier that is used solely to provide interactive on-demand services.⁴⁰⁴ "Interactive on-demand services" are defined as "service[s] providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming

(Continued from previous page)

operator to connect with the existing PEG feeds, with such costs borne by the OVS operator. 47 C.F.R. § 76.1505(d).

³⁹⁷ Verizon Comments at 75.

³⁹⁸ See Verizon Comments at 21. See also South Slope Comments at 11; NCTA Comments at 12.

³⁹⁹ Verizon Comments at 83.

⁴⁰⁰ Verizon Comments at 75.

⁴⁰¹ 47 U.S.C. § 522(7)(C). See also Verizon Comments at 82-87.

⁴⁰² 47 U.S.C. § 522(7)(C).

⁴⁰³ See BellSouth at 42; NATOA Reply at 27-28.

⁴⁰⁴ 47 U.S.C. § 522(7)(C).

prescheduled by the programming provider.""" We do not address at this time what particular services may fall within the definition.

124. We note that this discussion does not address the regulatory classification of any particular video service, being offered. We do not address in this **Order** whether video services provided over Internet Protocol are or are not "cable services."""

D. Preemption of Local Laws, Regulations and Requirements

125. Having established rules and guidance to implement Section 621(a)(1), we turn now to the question of local laws that may be inconsistent with our decision today. Because the rules we adopt represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission, they have preemptive effect pursuant to Section 636(c). Alternatively, local laws are impliedly preempted to the extent that they conflict with this **Order** or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.""

126. At that outset of this discussion, it is important to reiterate that we do not preempt state law or state level franchising decisions in this **Order**.⁴⁰⁸ Instead, we preempt only local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this **Order**; and (2) such provisions are not specifically authorized by state law. As noted above,""" we conclude that the record before us does not provide sufficient information to make determinations with respect to franchising decisions where a state is involved, issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We expressly limit our findings and regulations in this **Order** to actions or inactions at the local level where a state has not circumscribed the LFA's authority. For example, in light of differences between the scope of franchises issued at the state level and those issued at the local level, it may be necessary to use different criteria for determining what may be unreasonable with respect to the key franchising issues addressed herein. We also recognize that many states only recently have enacted comprehensive franchise reform laws designed to facilitate competitive entry. In light of these facts, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises.

127. Section 636(c) of the Communications Act provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.""" In the *Local Franchising NPRM*, the Commission tentatively concluded that, pursuant to the authority granted under Sections 621 and 636(c), and under the Supremacy Clause,⁴¹¹ the Commission

⁴⁰⁵ 47 U.S.C. § 522(12)

⁴⁰⁶ See *IP-Enabled Services*, 19 FCC Rcd 4863 (2004); Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-36 (filed Feb. 5, 2004); Letter from James C. Smith, Senior Vice President, SBC Services Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36 (filed Sept. 14, 2005).

⁴⁰⁷ *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

⁴⁰⁸ See *supra* note 2

⁴⁰⁹ *Id*

⁴¹⁰ 47 U.S.C. § 556(c).

⁴¹¹ U.S. Const., Art. VI. cl.2

may deem to be preempted any state or local law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Title VI.⁴¹² For example, we may deem preempted any local law that causes an unreasonable refusal to award a competitive franchise in violation of Section 621(a)(1).⁴¹³ Accordingly, the Commission sought comment on whether it would be appropriate to preempt state and local legislation to the extent we find that it serves as an unreasonable barrier to the grant of competitive franchises.

128. The doctrine of federal preemption arises from the Supremacy Clause, which provides that federal law is the "supreme Law of the Land."⁴¹⁴ Preemption analysis requires a statute-specific inquiry. There are various avenues by which state law may be superseded by federal law. We focus on the two which are most relevant here. First, preemption can occur where Congress expressly preempts state law.⁴¹⁵ When a federal statute contains an express preemption provision, the preemption analysis consists of identifying the scope of the subject matter expressly preempted and determining if a state's law falls within its scope.⁴¹⁶ Second, preemption can be implied and can occur where federal law conflicts with state law.⁴¹⁷ Courts have found implied "conflict preemption" where compliance with both state and federal law is impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴¹⁸

129. Applying these principles to this proceeding, we find that local franchising laws, regulations, and agreements are preempted to the extent they conflict with the rules we adopt in this *Order*. Section 636(c) expressly preempts state and local laws that are inconsistent with the Communications Act.⁴¹⁹ This provision precludes states and localities from acting in a manner inconsistent with the Commission's interpretations of Title VI so long as those interpretations are valid.⁴²⁰ It is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636.⁴²¹ As noted elsewhere, we adopt the rules in this *Order* pursuant to our interpretation of Section 621(a)(1) and other relevant Title VI provisions in light of the twin congressional goals of promoting competition in the multichannel video marketplace and promoting broadband deployment.⁴²² These rules represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission. They therefore have preemptive effect pursuant to Section 636(c).

⁴¹² *Local Franchising NPRM*, 20 FCC Rcd at 18589

⁴¹³ *Id.*

⁴¹⁴ U.S. Const. Art. VI. cl. 2. See also *Hillsborough County, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985).

⁴¹⁵ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)

⁴¹⁶ *Id.* at 517.

⁴¹⁷ *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

⁴¹⁸ *Id.*

⁴¹⁹ 47 U.S.C. § 556(c).

⁴²⁰ See, e.g., *Liberty Cablevision of Puerto Rico, Inc. v. Municipalin of Caguas*, 417 F.3d 216 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under Section 636(c) where inconsistent with Section 622 of the Communications Act).

⁴²¹ See *Cipollone*, 505 U.S. at 517; *Capital Cities Cable*, 467 U.S. 691, 699 (1984)

⁴²² See *supra* paras. 2-4, 61-64.

130. Alternatively, we find that such local laws, regulations, and agreements are impliedly preempted to the extent that they conflict with this **Order** or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴²³ Among the stated purposes of Title VI is to (1) “establish a national policy concerning cable communications,” (2) “establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community,” and (3) “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.”⁴²⁴ The legislative history to both the 1984 and 1992 Cable Acts identifies a national policy of encouraging competition in the multichannel video marketplace and recognizes the national implications that the local franchising process can have on that policy.⁴²⁵ The national policy of promoting a competitive multichannel video marketplace has been repeatedly reemphasized by Congress, the Commission, and the courts.⁴²⁶ The record here shows that the current operation of the franchising process at the local level conflicts with this national multichannel video policy by imposing substantial delays on competitive entry and requiring unduly burdensome conditions that deter entry.⁴²⁷ And to the extent that local requirements result in LFAs unreasonably refusing to award competitive franchises, such mandates frustrate the policy goals underlying Title VI. The rules we adopt today, *e.g.*, limits on the time period for LFA action on competitive franchise applications,⁴²⁸ limits on LFA’s ability to impose build-out requirements,⁴²⁹ and limits on LFA collection of franchise fees,⁴³⁰

⁴²³ *Florida Lime and Avocado Growers*, 373 U.S. at 142-43.

⁴²⁴ 47 U.S.C. § 521 (1), (2) & (6).

⁴²⁵ See H.R. REP. NO. YX-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656; S. REP. NO. 97-518, at 14 (1982) (“free and open competition in the marketplace” and the “elimination and prevention of artificial barriers to entry” are essential to the growth and development of the cable industry); H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-60.

⁴²⁶ See, *e.g.*, 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is “to promote competition in cable communications”); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993) (recognizing “[o]ne objective of the Cable Act was to set out ‘franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community.’” (citing 47 U.S.C. § 521(2))).

⁴²⁷ See, *e.g.*, AT&T Reply at 6-7 (“today’s standardless Franchising process, and the anticompetitive substantive conditions demanded of new entrants by many LFAs ... not only delay entry, but often prevent it altogether”); AT&T Comments at 43 (listing several conditions commonly imposed in the local franchising process that raise the cost of entry, deter broadband investment, and deny consumers the benefits of competition and choice); Verizon Comments at iv-vi (the franchising process is often marked by inordinate delay and is often used by many LFAs “as an opportunity to demand all manner of additional concessions, mostly unrelated to the provision of video services or the underlying purposes of franchise requirements, from the would-be competitor”); TIA Comments at 7-15 (many LFAs unreasonably delay the grant of competitive franchises and demand excessive concessions from potential entrants); USTA Comments at 1 Y-20 (“The single biggest obstacle to widespread competition in the video service market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service”); FTTH Council Comments at 59-60 (“the franchising process as implemented by numerous LFAs across the country continues to suffer from numerous flaws that frustrate the twin Congressional objectives of promoting cable competition and fostering deployment of advanced services to all Americans”); Alcatel Comments at 19 (“[t]he regulatory obstacle of thousands of local video franchises potentially wielding their authority to adopt unreasonable requirements will invariably impede deployment by competitors and negatively impact investment in advanced technologies and services”).

⁴²⁸ See *supra* Section III.C.1

⁴²⁹ See *supra* Section III.C.2.

⁴³⁰ See *supra* Section III.C.3.

are designed to ensure efficiency and fairness in the local franchising process and to provide certainty to prospective marketplace participants. This, in turn, will allow us to effectuate Congress' twin goals of promoting cable competition and minimizing unnecessary and unduly burdensome regulation on cable systems. Thus, not only are Section 636(c)'s requirements for preemption satisfied, but preemption in these circumstances is proper pursuant to the Commission's judicially recognized ability, when acting pursuant to its delegated authority, to preempt local regulations that conflict with or stand as an obstacle to the accomplishment of federal objectives.⁴³¹

131. We reject the claim by incumbent cable operators and franchising authorities that the Commission **lacks** authority to preempt local requirements because Congress has not explicitly granted the Commission the authority to preempt.⁴³² These commenters suggest that because the Commission seeks to preempt a power traditionally exercised by a state or local government (*i.e.*, local franchising), under the Fifth Circuit's decision in *City of Dallas*,⁴³³ the Commission can only preempt where it is given express statutory authority to do so.⁴³⁴ However, this argument ignores the plain language of Section 636(c), which states that "any provision of law of any State, political subdivision, or agency therefore, or franchising authority ... which is inconsistent with this chapter shall be deemed to be preempted and superseded."⁴³⁵ Moreover, Section 621 expressly limits the authority of franchising authorities by prohibiting exclusive franchises and unreasonable refusals to award additional competitive franchises.⁴³⁶ Congress could not have stated its intent to limit local franchising authority more clearly. These provisions therefore satisfy any express **preemption** requirement.⁴³⁷

132. Furthermore, as long as the Commission acts within the scope of its delegated authority in adopting rules that implement Title VI, including the prohibition of Section 621(a)(1), its rules have preemptive effect.⁴³⁸ Courts assess whether an agency acted within the scope of its authority "without any presumption one way or the other"; there is no presumption against preemption in this context.⁴³⁹ As noted above, Congress charged the Commission with the task of administering the Communications Act,

⁴³¹ See, e.g., *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

⁴³² See Comcast Comments at 36-37; Comcast Reply at 35-37; **Burnsville/Eagan** Comments at 35-36.

⁴³³ *City of Dallas*, 165 F.3d at 341.

⁴³⁴ See Comcast Comments at 17; Comcast Reply at 36; **Burnsville/Eagan** Comments at 35-36.

⁴³⁵ 47 U.S.C. § 556(c).

⁴³⁶ 47 U.S.C. § 541(a)(1).

⁴³⁷ See *Liberty Cablevision of Puerto Rico v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2008) (Section 636(c) makes clear that Congress "unmistakably" intended to preempt state and local franchising decisions that are inconsistent with the Act, including Section 621); *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2d 1236, 1243 (D Colo. 2001) (a franchise provision in the Boulder, Colorado charter was preempted by Section 621(a)(1) because it conflicted directly with that provision's mandate that the "franchising authority" be responsible for granting the franchise).

⁴³⁸ See *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof"); *Louisiana Public Serv. Comm.*, 476 U.S. at 369 ("a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (when a federal agency promulgates regulations intended to preempt state law, courts uphold preemption as long as the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute"); *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes").

⁴³⁹ *New York v. FERC*, 535 U.S. 1, 18 (2002).

including Title VI, and the Commission has clear authority to adopt rules implementing provisions such as Section 621.⁴⁴⁰ Consequently, our rules preempt any contrary local regulations.⁴⁴¹

133. We also find no merit in incumbent cable operators' and local franchising authorities' argument that the scope of the Commission's preemption authority under Section 636(c) is limited by the terms of Section 636(a) of the Act.⁴⁴² Section 636(a) provides that nothing in Title VI "shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title."⁴⁴³ The very reason for preemption in these circumstances is that many local franchising laws and practices are at odds with the express provisions of Title VI, as interpreted in this *Order*. Consequently, Section 636(a) presents no obstacle to preemption here. We therefore need not decide whether the state and local laws at issue relate to "matters of public health, safety, and welfare" within the meaning of Section 636(a).

134. We also reject the franchising authorities' argument that any attempt to preempt lawful local government control of public rights-of-way by interfering with local franchising requirements, procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States Constitution.⁴⁴⁴ The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."⁴⁴⁵ We conclude that our actions here do not run afoul of the Fifth Amendment for several reasons. To begin with, our actions do not result in a Fifth Amendment taking. Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way,⁴⁴⁶ but rather hold the public streets and sidewalks in trust for the public.⁴⁴⁷ As one court explained, "municipalities generally possess no rights to profit from their streets unless specifically authorized by the state."⁴⁴⁸ Also, we note that

⁴⁴⁰ See *supra* paras. 53-64.

⁴⁴¹ See *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-58 (1982); *City of New York*, 486 U.S. at 64. See also AT&T Comments at 41-42.

⁴⁴² See Comcast Comments at 39 (citing 47 U.S.C. § 556(a)). See also Florida Municipalities Comments at 18-19 (the Cable Act provides for limited preemption of local regulatory efforts in certain specific areas, none of which cover competitive franchises). Commencers further point to the legislative history for Section 636(a), which noted that a state may "exercise authority over the whole range of cable activities, such as negotiations with cable operators; consumer protection; construction requirements; rate regulation or deregulation; the assessment of financial qualifications; the provision of technical assistance with respect to cable; and other franchise-related issues – as long as the exercise of that authority is consistent with Title VI." See Comcast Comments at 39-40 (citing H.R. REP. NO. 98-934, at 94 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655, 4731).

⁴⁴³ 47 U.S.C. § 556(a) (emphasis added).

⁴⁴⁴ See Texai Coalition of Cities Comments at 29-35; Burnsville/Eagan Comments at 38. Burnsville/Eagan further argues that Fifth Amendment concerns would arise if the Commission were to interfere with the terms under which a competitive franchise is granted, thereby forcing modifications to existing cable franchises, pursuant to state and local level-playing-field requirements, thus depriving LFAs of lawful and reasonable compensation they negotiated with the incumbent cable operators for the use of public rights-of-way.

⁴⁴⁵ U.S. Const. Amend. V.

⁴⁴⁶ See *Liberty Cablevision*, 417 F.3d at 222.

⁴⁴⁷ See *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001); see also *Liberty Cablevision*, 417 F.3d at 222 (recognizing that it is "a mistake to suppose ... [that] the city is constitutionally and necessarily entitled to compensation" for use of the city streets).

⁴⁴⁸ See *Liberty Cablevision*, 417 F.3d at 222.

telecommunications carriers that seek to offer video service already have an independent right under state law to occupy right-of-way.⁴⁴⁹ States have granted franchises to telecommunications carriers, pursuant to which the carriers lawfully occupy public rights-of-way for the purpose of providing telecommunications service.⁴⁵⁰ Because all [municipal power is derived from the state,⁴⁵¹ courts have held that “a state can take public rights-of-way without compensating the municipality within which they are located.”⁴⁵² Given the municipality is not entitled to compensation when its interest in the streets are taken pursuant to state law, it is difficult to see how the transmission of additional video signals along those same lines results in any physical occupation of public rights-of-way beyond that already permitted by the states.⁴⁵³

135. Moreover, even if there was a taking, Congress provided for “just compensation” to the local franchising authorities.” Section 622(h)(2) of the Act provides that a local franchising authority may recover a franchise fee of up to 5 percent of a cable operator’s annual gross revenue.” Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways.⁴⁵⁶ The implementing regulations we adopt today do not eviscerate the ability of local authorities to impose a franchise fee. Rather, our actions here simply ensure that the local franchising authority does not impose an excessive fee or other unreasonable costs in violation of the express statutory provisions and policy goals encompassed in Title VI.⁴⁵⁷

136. Finally, LFAs maintain that the Commission’s preemption of local governmental powers offends the Tenth Amendment of the U.S. Constitution.⁴⁵⁸ The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”” In support of their position, commenters argue

⁴⁴⁹ See Verizon Reply at 25

⁴⁵⁰ See Verizon Reply at 25; South Slope Comments at 10-11; NCTA Comments at 12

⁴⁵¹ See *St. Louis v. Western Union Telegraph Co.*, 149 U.S. 465, 467 (1893); *Liberty Cablevision*, 417 F.3d at 221

⁴⁵² See *City & County of Denver*, 18 P.3d 748, 761 (Colo. 2001)

⁴⁵³ See Verizon Reply at 25-26. See also *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 109 (4th Cir. 1994) (reasoning that the transmission of cable television signals “would not impose an additional burden on [a] servient estate” on which telephone poles, power lines, and telephone wires had previously been installed).

⁴⁵⁴ See *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones). Because we find that the statute provides just compensation, we need not address whether the takings clause of the Fifth Amendment encompasses the property interests of state and local governments in the same way that it applies to the property interests of private persons.

⁴⁵⁵ 47 U.S.C. § 542(h)(2)

⁴⁵⁶ In passing the 1984 Cable Act, Congress recognized local government’s entitlement to “assess the cable operator a fee for the operator’s use of public ways,” and established “the authority of a city to collect a franchise fee of up to 5 percent of an operator’s annual gross revenues.” H.R. REP. NO. 98-934, at 26 (1984), as reprinted in 1984 U.S.C.A.N. 4655,4663.

⁴⁵⁷ For the reasons stated above, we need not reach the issue of whether a “taking” has occurred with respect to a competitive applicant providing cable service over the same network it uses to provide telephone service, for which it is already authorized by the local government to use the public rights-of-way.

⁴⁵⁸ See Michigan Municipal League Comments at 24 (“[a]ny action by the Commission to mandate the granting of a franchise directly or by means of state actions in favor of any party over the objection of the local franchising authority offends the Tenth Amendment of the U.S. Constitution”); Anne Arundel County Comments at 50 (same).

⁴⁵⁹ U.S. Const. Amend. X

that the Commission is improperly attempting to override local government's duty to "maximize the value of local property for the greater good" by imposing a federal regulatory scheme onto the states and/or local governments.'" Contrary to the local franchising authorities' claim, however, they have failed to demonstrate any violation of the Tenth Amendment.⁴⁶¹ "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."⁴⁶² Thus, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises.'" Regulation of cable services is well within Congress' authority under the Commerce Clause.⁴⁶⁴ Thus, because our authority in this area derives from a proper exercise of congressional power, the Tenth Amendment poses no obstacle to our preemption of state and local franchise law or practices.'" Likewise, there is no merit to LFA commenters' suggestion that Commission regulation of the franchising process would constitute an improper "commandeering" of state governmental power.⁴⁶⁶ The Supreme Court has recognized that "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the "power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."'" And here, we are simply requiring local franchising authorities to exercise their regulatory authority according to federal standards, or else local requirements will be preempted. For all of these reasons, our actions today do not offend the Tenth Amendment.

137. We do not purport to identify every local requirement that this *Order* preempts. Rather, in accordance with Section 636(c), we merely find that local laws, regulations and, agreements are preempted to the extent they conflict with this *Order* and the rules adopted herein. For example, local laws would be preempted if they: (1) authorize a local franchising authority to take longer than 90 days to act on a competitive franchise application concerning entities with existing authority to access public rights-of-way, and six months concerning entities that do not have authority to access public rights-of-way;⁴⁶⁸ (2) allow an LFA to impose unreasonable build-out requirements on competitive franchise applicants;⁴⁶⁹ or (3) authorize or require a local franchising authority to collect franchise fees in excess of the fees authorized by law.'"

138. One specific example of the type of local laws that this *Order* preempts are so-called "level-playing-field" requirements that have been adopted by a number of local authorities.'" We find

⁴⁶⁰ See Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

⁴⁶¹ See Veriron Reply at 27-29.

⁴⁶² See *New York v. U.S.*, 505 U.S. 144, 156 (1992).

⁴⁶³ See *id.* at 157-58.

⁴⁶⁴ See *Crisp*, 467 U.S. at 700-701 (holding that cable services are interstate services).

⁴⁶⁵ See *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F.Supp.2d 1236, 1245 ("the inquiries under the Commerce Clause and the Tenth Amendment are mirror images, and a holding that a Congressional enactment does not violate the Commerce Clause is dispositive of a Tenth Amendment challenge) (citing *United States v. Baer*, 235 F.3d 561, 563 n.6 (10th Cir. 2000)). See also Veriron Reply at 28.

⁴⁶⁶ See Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

⁴⁶⁷ See *New York v. U.S.*, 505 U.S. at 167.

⁴⁶⁸ See *supra* at Section III.C.1.

⁴⁶⁹ See *supra* at Section III.C.2.

⁴⁷⁰ See *supra* at Section III.C.3.

⁴⁷¹ See, e.g., GMTC Comments at 15.

that these mandates unreasonably impede competitive entry into the multichannel video marketplace by requiring LFAs to grant franchises to competitors on substantially the same terms imposed on the incumbent cable operators.” As an initial matter, just because an incumbent cable operator may agree to franchise terms that are inconsistent with provisions in Title VI, LFAs may not require new entrants to agree to such unlawful terms pursuant to level-playing-field mandates because any such requirement would conflict with Title VI. Moreover, the record demonstrates that aside from this specific scenario, level-playing-field mandates imposed at the local level deter competition in a more fundamental manner. The record indicates that in today’s market, new entrants face “steep economic challenges” in an “industry characterized by large fixed and sunk costs,” without the resulting benefits incumbent cable operators enjoyed for years as monopolists in the video services marketplace.⁴⁷³ According to commenters, “a competitive video provider who enters the market today is in a fundamentally different situation” from that of the incumbent cable operator: “[w]hen incumbents installed their systems, they had a captive market,” whereas new entrants “have to ‘win’ every customer from the incumbent” and thus do not have “anywhere near the number of subscribers over which to spread the costs.”⁴⁷⁴ Commenters explain that “unlike the incumbents who were able to pay for any of the concessions that they grant an LFA out of the supra-competitive revenue from their on-going operations,” “new entrants have no assured market position.”” Based on the record before us, we thus find that an LFAs refusal to award an additional competitive franchise unless the competitive applicant meets substantially all the terms and

⁴⁷² See FTTH Council Comments at 28-31 (“there is substantial evidence that level playing field requirements have harmed new entrants or simply scared off applicants in the first place”); Verizon Comments at 76-80 (level-playing-field provisions are “protectionist requirements” for the benefit of the incumbent cable operator and are often cited as a basis for imposing all manner of additional costs and obligations, many of which are unreasonable and/or unlawful, on a would-be new entrant into the market); USTA Reply at 23-26, 32-34 (level-playing-field laws intrinsically limit the ability of LFAs to award franchises); see also, GAO Report, *Wire-Based Competition Benefited Consumers in Selected Markets* (Feb. 2004), GAO-04-241 Report at 21 (noting that one local official indicated that the level-playing-field law in his state was a factor in an interested competitive cable company’s retracting a cable application); BSPA Comments at 4-5 (level-playing-field statutes are a superficial appeal to fairness that masks the real intent to protect the incumbent’s market position, and such requirements delay or limit the growth of competition by negatively impacting the availability or use of capital); Letter from Lawrence Spiwak, President, Phoenix Ctr. For Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission at Attachment, *Phoenix Center Policy Paper Number 21: Competition After Unbundling: Entry, Industry Structure and Convergence*, 37 (“presence of a ‘first mover’ advantage means that requiring a new entrant to bear an entry cost simply because the incumbent cable operator has already borne it will have the effect of deterring entry substantially, even if such costs did not deter the incumbent cable operator from offering service”) (March 13, 2006) (“Phoenix Center Competition Paper”); DOJ *Ex Parte* at 16. But see Comcast Comments at 40 (maintaining that state level-playing-field statutes are a legitimate and well-established exercise of state and local regulatory authority and are not inconsistent with the Communications Act); NATOA Reply at 43-44 (maintaining that there is little or no evidence to suggest that state level-playing-field laws have had anywhere near the draconian effect on the granting of competitive franchises as the telephone industry alleges).

⁴⁷³ See USTA Reply at 24. See also, Verizon Reply at 65 (“In exchange for the costs they incurred to enter the market, the incumbent cable operators generally received exclusive franchises and enjoyed all of the benefits of being monopoly providers for years, often decades.”); Mercatus Comments at 40 (“while a second cable operator will have to make the same unrecoverable investment previously made by the incumbent, it will not have the benefit of a monopoly over which to amortize it”); FTTH Council Comments at 3 (“New entrants are highly unlikely to ever obtain and enjoy the fruits of market power. Consequently, the burdens of the pre-existing franchising process from the perspective of these new entrants are not offset by the benefits that the monopolists enjoyed.”).

⁴⁷⁴ See FTTH Council Comments at 30 (quoting Andy Sarwal Declaration, para. 7); Verizon Comments at 77 (new entrants “[face] ubiquitous competition from strong and entrenched competitors, which in turn leads to lower market share and lower profit margins”).

⁴⁷⁵ See Verizon Reply at 65. See also USTA Reply at 24.

conditions imposed on the incumbent cable operator may be unreasonable, and inconsistent with the "unreasonable refusal" prohibition of Section 621(a)(1).⁴⁷⁷ Accordingly, to the extent a locally-mandated level-playing-field requirement is inconsistent with the rules, guidance, and findings adopted in this *Order*, such requirement is deemed preempted."⁴⁷⁸

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

139. As discussed above, this proceeding is limited to competitive applicants under Section 621(a)(1).⁴⁷⁷ Yet, some of the decisions in this *Order* also appear germane to existing franchisees. We asked in the *Local Franchising NPRM* whether current procedures and requirements were appropriate for any cable operator, including existing operators.⁴⁷⁸ NCTA argues that if the Commission establishes franchising relief for new entrants, we should do the same for incumbent cable operators because imposing similar franchising requirements on new entrants and incumbent cable operators promotes competition.⁴⁷⁹ Somewhat analogously, the BSPA argues that any new franchise regulatory relief should extend to all current competitive operators and new entrants equally; otherwise, the inequities would effectively penalize existing competitive franchisees simply because they were the first to risk competition with the incumbent cable operator.⁴⁸⁰ The record does not indicate any opposition by new entrants to the idea that any relief afforded them also be afforded to incumbent cable operators.⁴⁸¹ Some incumbent cable operators discussed the potential impact of Commission action under Section 621 on incumbent cable operators. For example, Charter argues that granting competitive cable providers entry free from local franchise requirements would affect Charter's ability to satisfy its existing obligations; funds that Charter might use to respond to competition by investing in new facilities and services would instead be tied up in franchise obligations not imposed on Charter's competitors, which would undermine the company's investment and render its franchise obligations commercially impracticable.⁴⁸² AT&T

⁴⁷⁶ We also find troubling the record evidence that suggests incumbent cable operators use "level-playing-field" requirements to frustrate negotiations between LFAs and competitive providers, causing delay and preventing competitive entry. See, e.g., Letter from John Goodman, Broadband Service Providers Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006) (explaining that the incumbent cable operator used level-playing-field requirements to bring litigation against the LFA which delayed the negotiation process and made entry so expensive that it no longer became feasible for the new entrant); Texas Coalition of Cities Comments at 13 ("Most delays in *competitive franchise* negotiations result from the incumbent cable provider's demands that competitive providers' franchises contain virtually identical terms."); Verizon Reply at 65-66 ("incumbents' over-eagerness to support these anticompetitive requirements further evidences the need for the Commission to remove this roadblock to competition"),

⁴⁷⁷ See *supra* paras. 1, 113.

⁴⁷⁸ *Local Franchising NPRM*, 20 FCC Rcd at 18588

⁴⁷⁹ NCTA Comments at 13 (quoting *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14855-56, 14864-65 (2005) "[t]reating like services alike promotes competition" by allowing the market to determine the better operator rather than providing one operator "artificial regulatory advantages"). See also Cox Reply at 2-4.

⁴⁸⁰ BSPA Comments at 2-3.

⁴⁸¹ See, e.g., BSPA Comments at 2-3 (any new regulatory relief in franchising should apply to **all** current competitive operators and potential new entrants). But see FTTN Council Comments at 24 (new entrants are not treated more favorably than incumbents when they are burdened with the same requirements as incumbents but do not have the same market power)

⁴⁸² Charter Comments at 3-4

argues that competition will not harm incumbent cable operators: cable has handled the competition that DBS presents, and analysts predict that the new wave of competition will not put them out of business.'''

140. We tentatively conclude that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs. We note that Section 611(a) states "A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee." These statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants. We seek comment on our tentative conclusion. We also seek comment on our authority to implement this finding. We also seek comment on what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises. The Commission will conclude this rulemaking and release an order no later than six months after release of this *Order*.

141. In the *Local Franchising NPRM*, we also sought comment on whether customer service requirements should vary greatly from jurisdiction to jurisdiction.''' In response, AT&T urges us to adopt rules to prevent LFAs from imposing various data collection and related requirements in exchange for a franchise.⁴⁸⁵ AT&T claims that LFAs have imposed obligations that franchisees collect, track, and report customer service performance data for individual franchise areas.⁴⁸⁶ AT&T states that it operates its call centers and systems on a region-wide basis, and that it is not currently possible or economically feasible for AT&T to comply with the various local customer service requirements on a franchise by franchise basis.''' AT&T also asks us to affirm that LFAs may not, absent the franchise applicant's consent, impose any local service quality standards that go beyond the requirements of duly enacted laws and ordinances.'** Verizon indicates that some localities have conditioned the grant of a franchise upon the submission of Verizon's data services to local customer service regulation.⁴⁸⁹

142. NATOA opposes AT&T's request for relief from local customer service standards, and argues that the Act and the Commission's rules explicitly provide for local customer service regulation.⁴⁹⁰ Specifically, NATOA asserts that Section 632(d)(2) of the Cable Act allows for the establishment and enforcement of local customer service laws that go beyond the federal standards.⁴⁹¹ Other parties assert that customer service regulation is necessary to ensure that consumers have regulatory relief.⁴⁹²

⁴⁸³ AT&T Reply at 5

⁴⁸⁴ *Local Franchising NPRM*, 20 FCC Rcd at 18588

⁴⁸⁵ AT&T Comments at 72-73

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* As discussed in Section III.C.2 above, AT&T's existing call center regions do not mirror local franchise areas. One region can encompass multiple franchise areas, and impose a multitude of regulations upon a new entrant.

⁴⁸⁸ AT&T Comments at 73

⁴⁸⁹ Verizon Comments at 75

⁴⁹⁰ NATOA Reply at 40-41. See also New York City Comments at 3 (citing 47 U.S.C. § 552)

⁴⁹¹ 47 U.S.C. § 552(d)(2). Accord 47 C.F.R. § 76.309(b)(4).

⁴⁹² See, e.g., Alliance for Public Technology Comments at 2-3; American Association of People with Disabilities at 2; Cavalier Comments at 6.

143. Section 632(d)(2) states that:

[n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission Nothing in this Title shall be construed to prevent the establishment and enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.”

Given this explicit statutory language, we tentatively conclude that we cannot preempt state or local customer service laws that exceed the Commission’s standards, nor can we prevent LFAs and cable operators from agreeing to more stringent standards. We seek comment on this tentative conclusion.

V. PROCEDURAL MATTERS

144. *Ex Parte Rules.* This is a permit-but-disclose notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission’s rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

145. *Comment Information.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before 30 days after this *Further Notice of Proposed Rulemaking* is published in the Federal Register, and reply comments on or before 45 days of publication. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s **eRulemaking Portal**, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal **eRulemaking Portal**: <http://www.regulations.gov>. Filers should follow the instructions provided on the **website** for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the **comments** for each docket or rulemaking number referenced in the caption. In **completing** the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in

⁴⁹³ 47 U.S.C. § 552(d)(2). Accord 47 C.F.R. § 76.309(b)(4).

receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hnmp-ton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

146. *Initial Paperwork Reduction Act Analysis.* This *Further Notice of Proposed Rulemaking* does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

147. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act," the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Second Further Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

148. *Paperwork Reduction Act Analysis.* This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

149. In this present document, we have assessed the effects of the application filing requirements used to calculate the time frame in which a local franchising authority shall make a decision, and find that those requirements will benefit companies with fewer than 25 employees by providing such companies with specific application requirements of a reasonable length. We anticipate this specificity will streamline this process for companies with fewer than 25 employees, and that these requirements will not burden those companies.

⁴⁹⁴ See 5 U.S.C. § 603

150. *Final Regulatory Flexibility Analysis* As required by the Regulatory Flexibility Act,⁴⁹⁵ the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this **Report and Order and Further Notice of Proposed Rulemaking**. The FRFA is set forth in Appendix D.

151. *Congressional Review Act*. The Commission will send a copy of this **Report and Order and Further Notice of Proposed Rulemaking** in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

152. *Additional Information*. For additional information on this proceeding, please contact Holly Saurer, Media Bureau at (202) 418-2120, or Brendan Murray, Policy Division, Media Bureau at (202) 418-2120.

VI. ORDERING CLAUSES

153. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303r, 403 and 405 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303(r), 403 , this **Report and Order and Further Notice of Proposed Rulemaking** IS ADOPTED.

154. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections Sections 1, 2, 4(i), 303, 303a, 303b, and 307 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303a, 303b, and 307, the Commission's rules ARE HEREBY AMENDED as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

155. IT IS FURTHER ORDERED that the rules contained herein SHALL BE EFFECTIVE 30 days after publication of the **Report and Order and Further Notice of Proposed Rulemaking** in the Federal Register, except for the rules that contain information collection requirements subject to the Paperwork Reduction Act, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

156. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this **Report and Order and Further Notice of Proposed Rulemaking**, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

157. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this **Report and Order and Further Notice of Proposed Rulemaking** in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁹⁵ See 5 U.S.C. § 604

APPENDIX A

List of Commenters and Reply Commenters

1. Abilene, TX
2. Access Channel 5, NY
3. Access Fort Wayne, IN
4. Access Sacramento, CA
5. Ad Hoc Telecom Manufacturer Coalition
6. Ada Township, et al.
7. Advance/Newhouse Communications
8. AEI-Brookings Joint Center for Regulatory Studies
9. Alamance County, NC
10. Albuquerque, NM
11. Alcatel
12. Alhambra, CA
13. Alliance for Public Technology
14. Alpina, MI
15. American Association of Business Persons with Disabilities
16. American Association of People with Disabilities
17. American Cable Association
18. American Consumer Institute
19. American Corn Growers Association
20. American Homeowners Grassroots Alliance
21. Anaheim, CA
22. Angels Camp, CA
23. Anne Arundel County, Carroll County, Charles County, Howard County and Montgomery County
24. Apex, NC
25. Apple Valley, MN
26. Appleton, WI
27. Archdale, NC
28. Arlington Independent Media, VA
29. Asheboro, NC
30. Ashland, KY
31. Ashokie, NC
32. Association of Independent Programming Networks
33. AT&T Inc.
34. Atascadero, CA
35. Bailey, NC
36. Banning, CA
37. Barrington, IL
38. Bellefonte, PA
39. Bellflower, CA
40. BellSouth
41. Benson, NC
42. Berks Community TV, PA
43. Beverly Hills, CA
44. Biddeford, ME
45. Billerica Access TV, MA
46. Billerica, MA
47. Birmingham Area Cable Board, MI

48. Blue Lake, CA
49. Bonita Springs, FL
50. Boston Community Access and Programming Foundation (BCAPF)
51. Boston, MA
52. Bowie, MD
53. Branford Commun. TV, CT
54. Brea, CA
55. Brisbane, CA
56. Broadband Service Providers Association
57. Brunswick, ME
58. Bucks County Consortium of Communities, PA
59. Burlington, NC
60. Burnsville/Eagan Telecommunications Commission; The City of Minneapolis, MN; The North Metro Telecommunications Commission; The North Suburban Communications Commission; and The South Washington County Telecommunications Commission ("City of Minneapolis")
61. Cable Access St. Paul, MN
62. Cable Advisory Council of South Central CT
63. Cablevision Systems Corporation
64. Cadillac, MI
65. Calabash, NC
66. California Alliance for Consumer Protection
67. California Farmers Union
68. California Small Business Association
69. California Small Business Roundtable
70. Cambridge Public Access Corp, MA
71. Cambridge, MA
72. Campbell County Cable Board, KY
73. Cape Coral, FL
74. Capital Community TV, OR
75. Carlsbad, CA
76. Carrboro, NC
77. Cary, NC
78. Castalia, NC
79. Caswell County, NC
80. Cavalier Telephone, LLC/Cavalier IP TV, LLC
81. Cedar Rapids, Iowa
82. Center for Digital Democracy
83. Central St. Croix Valley Joint Cable Comm, MN
84. Certain Florida Municipalities
85. Champaign, IL
86. Champaign-Urbana Cable TV and Telecomm Commission, IL
87. Chapel Hill, NC
88. Charlotte, NC
89. Charter Communications, Inc.
90. Chicago Access Corp, IL
91. Chicago, IL
92. Cincinnati Bell, Inc.
93. Cincinnati, OH
94. Citizen's Community TV, CO
95. City and County of San Francisco, CA
96. City of Los Angeles

97. City of Philadelphia
98. City of St. Louis, Missouri
99. City of Ventura, California
100. Clackamas County, OK
101. **Clark** County, NV
102. Clay Count), FL
103. Clayton, NC
104. Clinton Township, MI
105. Clovis, CA
106. College Twp, PA
107. Comcast Corporation
108. Communications Support Group, Inc.
109. Community Access TV, IL
110. Community Propaniming Board of Forest Park et al, OH
111. Concord, CA
112. Concord, NC
113. Consumer Coalition of California
114. Consumer Electronics Association
115. Consumers First
116. Consumers for Cable Choice
117. Coral Springs, Florida
118. Coralville, IA
119. Coronado, CA
120. Cox Communications, Inc.
121. Cypress, CA
122. Daly City, CA
123. Dare County, NC
124. Darlington, SC
125. Davis, CA
126. Del Mar, CA
127. Delray Beach, FL
128. Democratic Processes Center
129. Discovery Institute's Technology & Democracy Project
130. Dortches, NC
131. Dublin, CA
132. Durham, NC
133. Eden, NC
134. El Cerrito, CA
135. Elk Grove, IL
136. Elon, NC*
137. Enumclaw, WA
138. Escondido, CA
139. Esopus, NY
140. Evanston, IL
141. Fairfax Cable Access, VA
142. Fairfax County, Virginia
143. Fairfax, CA
144. Faith, NC
145. Fall River Community TV, MA
146. Fargo, ND
147. Farmington, MN

148. Ferguson, PA
149. Ferndale, CA
150. Fiber-to-the-Home Council
151. Floral Park, NY
152. Florence, Kentucky
153. Florence, KY
154. Fort Worth, TX
155. Fortuna, CA
156. Foster City, CA
157. Foxboro Cable Access, MA
158. Franklin Lakes, NJ
159. Franklin, KY
160. Free Enterprise Fund
161. Free Press (Reply)
162. Free Press, Consumers Union, Consumer Federation of America
163. Freedomworks
164. Ft. Lauderdale, FL
165. Gainesville, FL
166. Garland, TX
167. Garner, NC
168. Geneva, IL
169. Georgia Municipal Association (GMA)
170. Gibsonville, NC
171. Gilroy, CA
172. Glenview, IL
173. Graham, NC
174. Grand Rapids, MI
175. Granite Quarry, NC
176. Great Neck/North Shore Cable Comm'n, NY
177. Greater Metro Telecommunications Consortium, et al. (GMTC)
178. Green Spring, K
179. Greensboro, NC*
180. Greenville, NC
181. Guilford County, NC
182. Harnett County, NC
183. Harris Township, PA
184. Haw River, NC
185. Hawaii Consumers
186. Hawaii Telcom Communications, Inc.
187. Henderson County, NC
188. Henderson, NV
189. Hialeah, FL
190. Hibbing Public Access TV, MN
191. High Point, NC
192. High Tech Broadband Coalition
193. Highlands, NC
194. Hillsborough, NC
195. Holly Springs, NC
196. Huntsville, AL
197. Imperial Beach, CA
198. Independent Multi-Family Communications Council

199. Indianapolis, IN
200. Institute for Policy Innovation
201. Intergovernmental Cable Conim Auth, MI
202. Iowa City, IA
203. Irvine, CA
204. Irwindale, CA
205. Itasca Comm TV, MN
206. Jackson, CA
207. Jamestown, NC
208. Jefferson County League of Cities Cable Comm'n, Kentucky
209. Jenkins, KY
210. Jersey Access Group, NJ
211. Kansas City, Missouri
212. Kernersville, NC
213. Killeen, TX
213. King County, WA
215. Kitty Hawk, NC
216. Knightdale, NC
217. La Puente, CA
218. Lake Forest, CA
219. Lake Lurie, NC
220. Lake Mills, WI
221. Lake Minnetonka Communications Comm, MN
222. Lake Worth, FL
223. Lakewood, CA
224. Las Vegas, NV
225. LaVerne, CA
226. League of Minnesota Cities (LMC)
227. League of United Latin American Citizens of the Northeast Region+
228. Leavenworth, **KS**
229. Lee County, FL
230. Leibowitz & Associates, P.A.
231. Lenexa, KS
232. Lewisville, NC
233. Lexington, NC
234. Lincoln, CA
235. Lincoln, NE
236. Long Beach, CA
237. Longmont, CO
238. Loomis, CA
239. Los Angeles Cable Television Access Corp., CA
240. Los Banos, CA
241. Lynwood, CA
242. Madison Hts, MI
243. Madison, NC
244. Madison, WI
235. Malvernc, NY
246. Manatee County, Florida
247. Manhattan Community Access Corp., NY
248. Marin Telecomm Agency, CA
249. Martha's Vineyard Comm TV, MA

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- 250. Maxton, NC
 - 251. Mayodan, NC
 - 252. Mayville, NY
 - 253. Maywood, CA
 - 254. Mecklenburg County, NC
 - 255. Medford, OR
 - 256. Medford, OR
 - 257. Media Action Marin, CA
 - 258. Media Bridges Cincinnati, OH
 - 259. Mercatus Center
 - 260. Metheun Comm TV, MA
 - 261. Metropolitan Area Comm Comm'n, OR
 - 262. Metropolitan Educational Access Corp. TN
 - 263. Miami Valley Comm Council, OH
 - 264. Miami-Dade County, Florida
 - 265. Michigan Municipal League
 - 266. Microsoft Corporation
 - 267. Middlesex, NC
 - 268. Midland, TX
 - 269. Milpitas, CA
 - 270. Minnesota Telecomm Alliance
 - 271. Minority Media and Telecommunications Council, et al.
 - 27. Missouri Chapter - National Association of Telecommunications Officers and Advisors (MO-NATOA)
 - 273. Mobile, AL
 - 274. Momery, NC
 - 275. Monrovia, CA
 - 276. Monterey Park, CA
 - 277. Montrose, CO
 - 278. Morrisville, NC
 - 279. Mount Morris, MI
 - 280. Mt. Hood Cable Regulatory Commission (MHCRC)
 - 281. Murfreesboro, TN
 - 282. Murfreesboro, NC
 - 283. Murrieta, CA
 - 284. National Association of Broadcasters
 - 285. National Black Chamber of Commerce
 - 286. National Cable & Telecommunications Association
 - 287. National Caucus and Center on Black Aged
 - 288. National Grange
 - 289. National Hispanic Council on Aging
 - 290. National Taxpayers Union
 - 291. National Telecommunications Cooperative Association
 - 292. NATOA, NLC, NACO, USCM, ACM, and ACD
 - 293. Naval Media Center, US
 - 294. New Jersey Board of Public Utilities (NJBPUI)
 - 295. New Jersey Division of the Ratepayer Advocate
 - 296. New York City
 - 297. New York State Conference of Mayors (NYCOM)
 - 298. Newton Comm Access Cntr, MA
 - 299. Norfolk, VA

300. North Kansas City, MO
301. North Liberty, IA
302. North Richland Hills, TX
303. Northbrook, IL
304. Northern Berkshire Comm TV Corp, MA
305. Northern Dakota County Cable Comm Comm'm
306. Northwest Suburbs Cable Commun Comm'n, MN
307. Norwalk, CA
308. Oceanside Comm TV, CA
309. Onslow Cnty, NC
310. Ontario, CA
311. Orange County, FL
312. Organization for the Promotion and Advancement of Small Telecommunications Companies
313. Orion Neighborhood TV, MI
314. Oxford, NC
315. Pacific Research Institute
316. Pac-West Telecomm, Inc
317. Palmetto, FL
318. Palo Alto, CA (on behalf of Joint Powers)
319. Pasadena, CA
320. Patton, PA
321. Peachtree City, GA
322. Pennsville, NJ
323. Perris, CA
324. Philadelphia, PA
325. Pike County, Kentucky
326. Pike County, KY
327. Pikeville, Kentucky
328. Pikeville, KY
329. Pinetops, NC
330. Pittshoro, NC
331. Plainfield, MI
332. Pleasant Garden, NC
333. Pleasant Hill, CA
334. Plymouth, MA
335. Pocatello, ID
336. Post Falls, ID
337. Poway, CA
338. Prince George's Community TV, Inc.
339. Prince George's County, MD
340. Princeton Community TV, NJ
341. Public Cable Television Authority
342. Public Utility Commission of Texas
343. Public, Educational and Government Access Oversight Comm of Metro Nashville
344. Queen Anne's County, MD
345. Quote Unquote, NM
346. Qwest Communications International Inc.
341. Ramsey/Washington Counties Suburban Cable Commun. Comm'n, MN
348. Rancho Cordova, CA
349. Rancho Santa Margarita, CA
350. Randolph County, NC

- 351 RCN Telecom Services, Inc.
352. Ked Oak, NC
353. Redding, CA
354. Reidsville, NC
355. Renton, WA
356. Richmond, KY
357. River Bend, NC
358. Rockingham County, NC
359. Rockwell, NC
360. Rolling Hills Estates, CA
361. Rowan County, NC
362. Sacramento Metro Cable TV Commission. CA
363. Saint Charles, MO
364. Salem, OR
365. Salt Lake City, UT
366. San Diego, CA
367. San Dimas, CA
368. San Jose, CA
369. San Juan Capistrano, CA
370. San Marcos, CA
371. San Mateo County Telecomm Auth, CA
372. Sanford, NC
373. Santa Clara, CA
374. Santa Clarita, CA
375. Santa Cruz County Community TV
376. Santa Rosa, CA
377. Santee, CA
378. Saratoga Springs, NY
379. Scotts Valley, CA
380. Seattle, WA
381. Sebastopol, CA
382. Self-Advocacy Association of New York State, Inc
383. Shaler, PA
384. Sierra Madre, CA
385. Signal Hill, CA
386. Siler City, NC
387. Simi Valley, CA
388. Sjoberg's, Inc.
389. Skokie, IL
390. Smithfield, NC
391. Solana Beach, CA
392. South Orange Village, NJ
393. South Portland, ME
394. South San Francisco, CA
395. South Slope Cooperative Telephone Company
396. Southeast Michigan Municipalities
397. Southwest Suburban Cable Commission (SWSCC)
398. Spring Hope, NC
399. Springfield, MO
400. St. Charles, IL
401. St. Paul, MN*

402. St. Petersburg, FL
403. Standish, ME
404. State College Borough, PA
405. State of Hawaii
406. Statesville, NC
407. Sun Prairie Cable Access TV, WI
408. Sunapee, NH*
409. Sunnyvale, CA
410. Susanville, CA
411. Tabor City, NC
412. Tampa, FL
413. Taylor, MI
414. Telco Retirees Association, Inc.
415. Telecommunications Industry Association
416. Temecula, CA
417. Texas Coalition of Cities for Utility Issues (TCCFUI)
418. Texas Municipal League and the Texas City Attorneys Association
419. The Progress & Freedom Foundation
420. Time Warner Cable
421. Tohaccoville, NC
422. Toppenish, WA
423. Torrance, CA
424. Truckee, CA
425. Tulsa, OK
426. Tuolumne, CA
427. Ukiah, CA
428. United States Internet Industry Association
429. United States Telecom Association
430. United States-Mexico Chamber of Commerce
431. URTV Asheville, NC
432. Valley Voters Organized Toward Empowerment
433. Vancouver Educational Telecommunications Consortium (VETC)
434. Vass, NC
435. Verizon
436. Vermont Public Service Board (VPSB)
437. Video Access Alliance
438. Villages of Larchmont & Mamaroneck, NY
439. Virginia Cable Telecommunications Association (VCTA)
440. Vista, CA
441. Wake Forest, NC
442. Walnut Creek, CA
- 433** Walnut Creek, California
444. Warrenville, IL
445. Washington State Grange
446. Wayland, MA
447. Wendell, NC
448. West Allis, WI
449. West Palm Beach, FL
450. Westport, WI
451. Wheaton, IL
452. Whitakers, NC

- 453. White Plains Cable Access TV NY
- 454. White. SD
- 455. Whittier, CA
- 456. Wilbraham, MA
- 457. Wilson. NC
- 458. Winchester, KY & KY Regional Cable Comm.
- 459. Windham Community TV, NH
- 460. Winston-Salem, NC
- 461. Wisconsin Association of Public, Educational and Government Access Channels (**WAPC**)
- 467. Women Impacting Public Policy
- 463. Worcester, MA
- 464. World Institute on Disability
- 465. Yanceyville, NC
- 466. Yuma, AZ
- 467. Zebulon. NC
- 468. Zeeland, MI